

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

IN RE)	
)	NO. 3-83-00372
SOUTHERN INDUSTRIAL BANKING)	
CORPORATION)	
)	Chapter 11
Debtor)	
<hr style="border: 0.5px solid black; margin: 10px 0;"/>		
THOMAS E. DuVOISIN, Liquidating)	
Trustee)	
)	
Plaintiff)	
)	
v.)	ADV. NO. 85-0749
)	
EMMA DAVIDSON,)	
Trustee for Signe Pananen)	
)	
Defendant)	

MEMORANDUM AND ORDER

This adversary proceeding came to be heard upon the plaintiff's motion for summary judgment. The motion was opposed by the defendant. This proceeding is one of many in which the plaintiff is seeking to recover alleged preferential transfers from investors who withdrew their funds from Southern Industrial Banking Corporation (SIBC) within ninety days of SIBC's bankruptcy filing.

During the early stages of these preference actions, the court consolidated the cases for purposes of determining common issues. One issue common to many of the cases concerned whether defendants would be able to maintain the ordinary-course-of-business defense under § 547(c)(2) of the preference statute. After conducting a

trial on this issue in several of the cases, Bankruptcy Judge George Paine filed an opinion styled *DuVoisin v. Anderson (In re Southern Indus. Banking Corp.)*, 92 B.R. 297 (Bankr. E.D. Tenn. 1988) which addressed the § 547(c)(2) defense. In that opinion, Judge Paine held that the following types of transfers were outside the ordinary course of business:

(1) all payments which involved the use of NSF checks;

(2) all payments in which defendants either used unusual collection methods or in any other way acted outside their ordinary course of dealings with SIBC;

(3) all payments made during and after the run period.

Id. at 309. Judge Paine also held that "[p]ayments before the run period made within 45 days of SIBC's incurring of the debt for interest, matured investments and unmatured investments, absent some other unusual act by either SIBC or the individual investors, are within the § 547(c)(2) ordinary course of business defense." *Id.* at 309.

At the time of Judge Paine's opinion, the majority view and Judge Paine's view was that under § 547(c)(2), payment by check occurred on the date of delivery if the check was presented for payment within the 30-day period deemed reasonable by Uniform Commercial Code § 3-503(2). *Id.* at 303. Since that opinion, however, the Supreme Court has concluded that a transfer for purposes of § 547(b) occurs on the date of honor. *Barnhill v. Johnson*, 112

S. Ct. 1386 (1992). Other recent Supreme Court and Sixth Circuit authority convince the court that the word "transfer" should not be defined differently for purposes of § 547(b) and § 547(c). See *Patterson v. Shumate*, 112 S. Ct. 2242, 2247 n. 2 (1992) ("a word is presumed to have the same meaning in all subsections of the same statute"); *In re Belknap*, 909 F.2d 880, 883 (6th Cir. 1990) ("[t]o give the word 'transfer' a different meaning in these complementary subparts seems inconsistent, unworkable, and confusing").

Because Judge Paine believed that payment by check for purposes of the § 523(c)(2) defense occurred on the date the check was delivered, the focus of his opinion in *Anderson* insofar as the ordinary-course-of-business defense was concerned was upon withdrawals and delivery of checks beginning on Monday, February 14. To say it differently, for purposes of discussing the § 523(c)(2) defense, Judge Paine understood payment to mean delivering the check, not honoring the check. He detailed a number of SIBC activities that were not in the ordinary course of business which were undertaken to deal with the customers who showed up on February 14 demanding repayment. What is not revealed in Judge Paine's opinion is whether checks that had already been issued prior to the run on SIBC were being honored by SIBC on February 14 in the ordinary course of business.

In evaluating the ordinary-course-of-business defense in this proceeding, it appears to the court that the transfer in question would not only include the circumstances surrounding the delivery

of the check, but would also include the circumstances surrounding the honoring of the check. Whether the check was honored in the ordinary course of SIBC's business is a question that apparently was not presented to or addressed by Judge Paine in *Anderson*. The court will allow the defendant the opportunity to conduct further discovery on this issue in light of the court's ruling on the meaning of "transfer" for purposes of the § 547(c)(2) defense.

The plaintiff's present motion for summary judgment is denied without prejudice.

IT IS SO ORDERED.

JOHN C. COOK
United States Bankruptcy Judge